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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934.

No. [redacted] 6

COMPAGNIE GENERALE TRANSATLANTIQUE,
Petitioner,

vs.

PHILIP ELTING, Collector of Customs, Port of New York.

No. [redacted] 7

HAMBURG-AMERICAN LINE,
Petitioner,

vs.

PHILIP ELTING, Collector of Customs, Port of New York.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934.

No. 783

COMPAGNIE GENERALE TRANSATLANTIQUE,
Petitioner,

vs.

PHILIP ELTING, COLLECTOR OF CUSTOMS, PORT OF NEW YORK.

No. 784

HAMBURG-AMERICAN LINE,
Petitioner,

vs.

PHILIP ELTING, COLLECTOR OF CUSTOMS, PORT OF NEW YORK.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

MAY IT PLEASE THE COURT:

The petition of the Compagnie Generale Transatlantique and the Hamburg-American Line respectfully shows to this Honorable Court:

The Essential Facts.

1. These are suits involving substantially identical facts and law, and were originally brought in the United States District Court for the Southern District of New York, to recover from the respondent, as Collector of Customs for the port of New York, three fines of $1,000 each alleged to be unlawfully assessed and which were collected from the petitioners, respectively, by the said official. Such suits arose out of the following facts:

2. In the case of Compagnie Generale Transatlantique the immigration authorities at the port of New York issued an order, purporting to be pursuant to Section 20 of the Immigration Act of 1924 (8 U. S. C., 167), directing the detention of 102 members of the crew of the steamship "Ile de France" (R. 29). This notice was served upon the fourth officer of the vessel (R. 28) and there was no notice served upon the master, charterer, agent, owner or consignee of the vessel. Two of the crewmen effected their escape in some manner not disclosed and could not be located when the vessel sailed.

3. In the case of the Hamburg-American Line, the immigration inspector issued an order (R. 17-18), purporting to be under the same statute as previously mentioned, directing the detention on board the vessel of one member of the crew; such order was not served upon any of the persons mentioned in the statute, but was delivered to the first officer of the ship at the time the vessel arrived in New York. The seaman effected his escape in some manner unknown.

4. Subsequently, the petitioners, respectively, were cited to show cause why they should not be assessed a penalty of $1,000 for each seaman, and sixty days were allowed for the submission of a defense by the petitioners.

5. Thereafter the petitioners submitted defenses (R. 37-39 and R. 22-23) to the notices above mentioned, which were directed to the *agents* of the respective vessels, neither of whom had been served with notices to detain the alien crewmen mentioned.

6. The defenses of the petitioners were rejected (R. 39-40 and R. 23-24) and the petitioners were required to pay $3,000 upon demand, as an alternative to refusal of clearance to their respective vessels.

7. Thereafter these suits were brought and upon a trial upon the official record, judgment was entered for the respondent in each case, with exceptions to the petitioners. The cases were tried together and were decided at the same time.

8. The Circuit Court of Appeals for the Second Circuit affirmed the decision of the District Court, for reasons set forth in an opinion by Manton, Circuit Judge (R. 50-51 and R. 35-37), and reported in 74 Fed. 2d, p. 209.

Reasons for Granting the Petition.

9. The decision below creates a direct conflict with the Circuit Court of Appeals for the Fifth Circuit, as set forth in the case of *Sinclair Navigation Company* v. *United States,* 32 F. (2d) 90. In that case there was a fine of $1,000.00 imposed against the carrier under the same provision of the statute as in the cases covered by this petition, for the escape of a seaman as to whom there had been no detention notice served upon the master of the vessel. The Circuit Court of Appeals for the Fifth Circuit held that in the absence of appropriate notice to detain the seaman on board the vessel the statutory penalty could not properly be imposed against the owner.

Furthermore, the decision below is in direct conflict with a decision by the same court in the case of *Lancashire Shipping Company, Ltd.*, v. *Elting*, 70 F. (2d) 699, in which it was held that both the detention notice and citation to show cause why a penalty should not be imposed must be served upon the person sought to be charged.

The petitioners therefore invoke Rule 38, Section 5, of the Rules of this Honorable Court, and suggest that the conflict of decisions as hereinbefore set forth is sufficient to justify the granting of this petition.

Jurisdiction.

10. The order for mandate below was entered on December 17, 1934 (R. 52 and 37, respectively).

11. Jurisdiction of this Court is provided by 28 U. S. C., Sec. 347 (a).

Statute Involved.

12. The statute involved is the Immigration Act of 1924 (8 U. S. C., Sec. 167). The particular part of that statute having a bearing upon the cases covered by this petition is Sub-section (a) of Section 167, which is set forth in the appendix hereof.

Questions Presented.

13. Whether the Secretary of Labor is justified in imposing upon a carrier a fine for the escape of an alien member of a vessel's crew as to whom notice to detain on board has not been served upon the master of the vessel.

14. Whether the Secretary of Labor is justified in imposing upon the owner, charterer, agent or consignee of a vessel a fine for the escape of an alien member of the vessel's crew as to whom notice to detain such alien on board the vessel had not been served upon such owner, charterer, agent or consignee.

15. Whether the requirements of due process of law are met by a citation to the owner or agent of a vessel to show cause why a fine should not be imposed, notwithstanding the absence of notice to such owner or agent that an alien member of a crew was required to be detained on board such vessel.

WHEREFORE, your petitioners respectfully pray that writs of certiorari be issued out of and under the seal of this Honorable Court, directed to the Circuit Court of Appeals for the Second Circuit, commanding that court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, No. 52, Compagnie Generale Transatlantique, Plaintiff-Appellant, v. Philip Elting, Collector of Customs, Port of New York, Defendant-Appellee, and the case numbered and entitled on its docket No. 97, Hamburg-American Line, Plaintiff-Appellant, v. Philip Elting, Collector of Customs, Port of New York, Defendant-Appellee, and that the said judgment of the Circuit Court of Appeals for the Second Circuit may be reversed by this Honorable Court, and that your petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioners will ever pray.

COMPAGNIE GENERALE TRANSATLANTIQUE,
HAMBURG-AMERICAN LINE,
By ROGER O'DONNELL,
Counsel for Petitioners.

LAMBERT O'DONNELL,
WILLIAM J. PETERS,
Of Counsel.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 783

COMPAGNIE GENERALE TRANSATLANTIQUE,
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PHILIP ELTING, Collector of Customs, Port of New York.

No. 784

HAMBURG-AMERICAN LINE, *Petitioner,*

vs.

PHILIP ELTING, Collector of Customs, Port of New York.

BRIEF IN SUPPORT OF PETITION FOR WRITS OF CERTIORARI.

I.

The Opinion of the Court Below.

The opinion of the United States Circuit Court of Appeals for the Second Circuit is reported in *Compagnie Generale Transatlantique v. Elting, Collector of Customs* and *Hamburg-American Line v. Same,* 74 F. (2d) 209 and is printed in each of the records herein (R. 50 and R. 35).

The contrary opinion of the Circuit Court of Appeals for the Fifth Circuit is reported in *Sinclair Navigation Company* v. *United States*, 32 F. (2d) 90.

II.

Jurisdiction.

1. The order for mandate below was entered on December 17, 1934 (R. 52 and 37, respectively).

2. Jurisdiction of this Court is provided by 28 U. S. C., sec. 347 (a) and is supported by the action of this Honorable Court in hearing and determining the case of *Hamburg-American Line* v. *United States*, 291 U. S. 420, 54 S. Ct. 491, 78 L. Ed. 887, involving interpretation of the Immigration Act of 1924, 8 U. S. C. A., sec. 216.

III.

Statement of the Facts.

The substantial facts have been set out in the petition to which this is appurtenant (*supra*. p. 2) and in the interest of brevity are not repeated at this point.

IV.

Specification of Errors.

A. The Circuit Court of Appeals for the Second Circuit erred in finding and holding that "The officer served on each vessel was in charge of that vessel at the time of the service of the order of detention." This conclusion finds no support whatever in the record.

B. The Circuit Court of Appeals for the Second Circuit erred in finding and holding that the master of a vessel is charged with the duty of obeying an order of detention not served upon him, but upon some subordinate officer of the vessel.

C. The Circuit Court of Appeals for the Second Circuit erred in finding and holding that the owner of a vessel is charged with penal responsibility for a master's or commanding officer's delinquency in failing to obey a notice to detain an alien seaman on board the ship, when the master is independently charged with such duty under the terms of the statute.

D. The Circuit Court of Appeals for the Second Circuit erred in finding and holding that the owner or agent of a vessel is charged with penal responsibility for the escape of a seaman ordered detained, in the absence of any notice to such owner or agent requiring such seaman to be detained on board the vessel.

E. The Circuit Court of Appeals for the Second Circuit erred in finding and holding that the notice to an owner or agent of an intention to impose an administrative fine, with a citation to show cause to the contrary, is due process of law, in the absence of express notice to such owner or agent, thus sought to be charged, requiring such alien seaman to be detained on board the vessel upon which he arrived.

F. The petition for a writ of certiorari should be granted.

V.

ARGUMENT.

Point A. The Circuit Court of Appeals for the Second Circuit erred in finding and holding that "The officer served on each vessel was in charge of that vessel at the time of the service of the order of detention." This conclusion finds no support whatever in the record.

The record is completely silent as showing that the masters of the respective vessels involved in these cases were not present and available for service of detention notices at

the time of the arrival of the respective ships. The records show that the detention notices by an immigration officer were prepared on the same day that the ship arrived and in the one case (*Compagnie* v. *Elting*, R. 28) the record shows receipt of notice by the fourth officer of the vessel, while in the other (*Hamburg* v. *Elting*, R. 22) the uncontradicted protest shows only service of notice upon the first officer of the vessel. No evidence was introduced on behalf of the defendant indicating that the master of either vessel was not available for the receipt of service of notice to detain the respective alien seaman. The statement in the opinion of the Circuit Court of Appeals is therefore volunteered and unsupported by evidence. It is submitted that this error goes to the substance of the cases covered by this petition, as the elimination of this erroneous conclusion restores the record to showing that there was no service of notice to detain upon the owner, charterer, agent, consignee or master of the vessel, those being the persons required to be served with such notice by Section 20 (a) of the Immigration Act of 1924, 8 U. S. C., Sec. 167 (a).

Point B. The Circuit Court of Appeals for the Second Circuit erred in finding and holding that the master of the vessel is charged with the duty of obeying an order of detention not served upon him, but upon some subordinate officer of the vessel.

The words of the statute, cited *supra*, are that

> The owner, charterer, agent, consignee, or master of any vessel arriving in the United States from any place outside thereof * * * who fails to detain such seaman on board after such inspection or to deport such seaman *if required by such immigration officer* or the Secretary of Labor to do so, shall pay to the collector of customs, etc. (Italics volunteered).

This statute clearly and patently prescribes that the respective parties named shall be "required" to detain the seaman on board the vessel. The word "require" is defined in the Standard Dictionary to mean "To demand, or to request authoritatively."

> The primary definition of "require" is to demand, to insist, to ask as a favor, to request. *Tennessee Coal, Lumber and Tanbark Company* v. *Waller*, 37 Fed. Rep. 545 (547).

Furthermore, the Circuit Court of Appeals for the Second Circuit, which decided the case that is the subject of this petition, ruled in the case of *Lancashire Shipping Company, Ltd.* v. *Elting, Collector, etc.*, 70 F. (2d) 699 (701) as follows:

> In order to lawfully impose a fine, it must appear that the *party required to detain the seaman* has been served with a detention order. (Italics supplied.)

The case of *Sinclair Navigation Company* v. *United States*, 32 F. (2d) 90 (C. C. A. 5th Circuit) involved a fine proceeding under the same statute invoked in the case covered by this petition. The master of the vessel had been orally ordered to convey an alien seaman to the hospital for treatment, but he escaped and the court found that "No written notice had been served on the master of the steamship to detain the alien on board the vessel." The court ruled (p. 91) that as there had been no order to detain the seaman on board in fact made would be sufficient to show the illegality of the assessment of the fine.

The foregoing rulings are plainly consonant with the language of the statute, which requires that notice to detain shall be given to the party or parties named in the statute, in order to charge them with liability accruing from breach of such notice.

As the records in the instant cases clearly show that the "requirement" of the statute was not brought home even to the masters of the vessels, by demand served upon them to detain the seamen on board the respective ships, it is submitted that the holding of the court below that the masters were nevertheless charged with responsibility to detain on board is reversible error and ought not to be allowed to stand.

C. The Circuit Court of Appeals for the Second Circuit erred in finding and holding that the owner of a vessel is charged with penal responsibility for a master's or commanding officer's delinquency in failing to obey a notice to detain an alien seaman on board the ship, when the master is independently charged with such duty under the terms of the statute.

The court below states "The owner was charged with the master's or commander's delinquency" (R. 36, fol. 36). In making this conclusion the court set at naught its own previous rulings in several cases involving the same point. It had ruled in the case of *Lancashire Shipping Company, Ltd.*, v. *Elting, Collector, etc.*, 70 F. (2d) 699, as follows, p. 701:

> To impose the fines, it is essential to show that the detention notice and the notice of hearing was served upon the agent. *United States* v. *Columbus Marine Corporation*, 62 F. (2d) 795; *United States* v. *J. H. Winchester & Co.*, 40 F. (2d) 472. * * * In order to lawfully impose a fine, it must appear that the party required to detain the seaman had been served with a detention order and that notice had been given him of the government's intention to assess a fine; thus there may be opportunity to be heard. Since the detention order was served on the ship's master and the notice of liability directed to the agent only, the necessary conditions for a lawful fine were not met. To bind the owner, intention to assess the fine must be plainly di-

> rected to him. The owner must be advised that he is the one who is required to pay. * * *
>
> The agent's filing of a protest was not a ratification of the master's authority to accept the detention notice on its behalf. The master was not the representative of the agent and in accepting service of the detention order, he may not be assumed to have acted for it. *The master is a party under the statute made liable for his violation. He must be regarded as acting in his individual capacity in taking the order.* (Italics volunteered.)

In *United States* v. *Columbus Marine Corporation*, 62 F. (2d) 795, the Circuit Court of Appeals for the Second Circuit held (p. 796):

> Each person must be ordered to detain the seaman, on whom any duty was to be imposed.

In *United States* v. *J. H. Winchester & Co., Inc.*, 40 F. (2d) 472, the Circuit Court of Appeals for the Second Circuit held (p. 473), Swan, Circuit Judge, speaking for the majority of the court:

> To the majority of the court it seems reasonable to believe that Congress did not intend to impose the penalty for failure to heed the inspector's demand *unless the demand was brought home to the person sought to be charged,* by notice to him or his authorized agent. Had Congress wished to impose the more stringent obligation it could readily have found an apt expression, by using the phrase "if the master be required." It is true that convenience of enforcement would be served by holding that notice to the master is notice to all, but Congress provided what it evidently thought to be an adequate remedy for collection by authorizing the withholding of clearance of the vessel, and mere convenience of enforcement cannot justify a strained construction of the language used. To us the appellant's contention requires, not an interpretation of the language used, but an addition of words by im-

> plication, so that it shall read, as above suggested, "if the master be required." Such an amendment by implication we do not think justified in a penal statute, where, if the language is ambiguous, the courts lean in favor of the defendant (citing numerous authorities).

From the foregoing it is obvious that the Circuit Court of Appeals for the Second Circuit is in a state of hopeless confusion as to what the statute really requires, and it is therefore submitted that the decision toward the reversal of which this petition is directed has decided an important question of local law in a way probably in conflict with applicable local decisions and has also decided an important question of general law in a way that is probably untenable and in conflict with its own previous well-considered rulings upon similar cases. Hence it is further submitted that it is a matter of public importance to have this statute authoritatively interpreted by this Honorable Court.

D. The Circuit Court of Appeals for the Second Circuit erred in finding and holding that the owner or agent of a vessel is charged with penal responsibility for the escape of a seaman ordered detained, in the absence of any notice to such owner or agent requiring such seaman to be detained on board the vessel.

The decision of the court below attempts to apply the doctrine of constructive notice by holding that notice to a subordinate officer of a vessel to detain an alien seaman on board the ship is at once notice to the owner or agent of the vessel.

The very first notice of any kind to the owner or agent in the cases forming the subject of this petition was a citation to show cause why a fine of $1,000 should not be imposed for each seaman not detained. The same court which decided this case decided the case of *Lancashire Shipping Company,*

Ltd., v. *Elting, Collector, etc.*, 70 F. (2d) 699, and held that constructive notice did not exist in these cases, stating (p. 701):

> The agent's filing of a protest was not a ratification of the master's authority to accept the detention notice on its behalf. The master was not the representative of the agent and in accepting service of the detention order he may not be assumed to have acted for it. The master is a party under the statute made liable for his (its) violation. He must be regarded as acting in his individual capacity in taking the order.

If that is a correct statement of the law when the master was in fact served with the detention order, it is obvious that it is still more correct when, as in the cases at bar, there was no service of notice upon the masters of the respective ships—in one case it was the fourth officer who was served and in the other case the first officer, both subordinate officials of the vessel and neither acting as master at the time, so far as the record shows.

It therefore appears obvious that the decision for the reversal of which this petition is directed is in error when it vicariously charges the owner or agent with notice to detain an alien member of a crew on board the vessel.

An identical situation existed in the case of *Navigazione Libera Triestine Societa Anonima* v. *Elting*, 4 Fed. Supp. 951, which terminated in the United States District Court for the Southern District of New York in a well-considered opinion by Goddard, J., who disposed of the question of reflected or constructive liability to penalization as follows (p. 953):

> The owner, charterer, agent, consignee, or master who fails to detain alien seamen "if required" to detain an alien by the immigration officer or the Secretary of Labor shall pay $1,000 if the alien is not detained. However, there are two conditions precedent that must

> be fulfilled before a valid fine may be imposed upon any one. He must first be "required" to detain the seaman, and the government must give him notice of its intention to assess a fine against him, with opportunity of being heard. * * * The only notice of the government's intention to fine anyone was the notice addressed to and served upon "Columbus Marine Corporation, Agent of the vessel 'Isarco' ". It is therefore plain that no valid fine was assessed against the owner, the plaintiff.

In the cases forming the subject of this petition the notices of intention to assess a fine were addressed to and served upon "French Line, Agent of the Vessel 'Ile de France' " (R. 32) and "Hamburg-American Line, Agents of the Vessel 'Milwaukee' " (R. 19), and this was the first notice of any kind so served. The present suits are brought by the owners of the respective vessels, who were never served with notice of any kind, either to detain the seamen or to show cause why penalties should not be imposed. It is therefore submitted that the imposition of any penalty under such circumstances was improvident, unlawful and a capricious act on the part of the Secretary of Labor.

E. The Circuit Court of Appeals for the Second Circuit erred in finding and holding that the notice to an owner or agent of an intention to impose an administrative fine, with a citation to show cause to the contrary, is due process of law, in the absence of express notice to such owner or agent, thus sought to be charged, requiring such alien seaman to be detained on board the vessel upon which he arrived.

As laid down by District Judge Goddard in the case of *Navigazione, etc.,* v. *Elting,* 4 Fed. Supp. 951, and quoted *supra* (pp. 15-16), there are two conditions precedent which must be fulfilled before a valid fine may be imposed; first, there must be the requirement to detain the seaman, and

then a notice upon the same authority of an intention to impose the administrative fine.

There is not the scintilla of evidence that any detention notice was served upon the owner, charterer, agent, or consignee of either of these vessels, and it is submitted that in this matter the well-known doctrine of *scienter* should be applied and that no guilty knowledge of official requirement is to be presumed in the absence of express notice to detain the seaman. Due process of law would, in all reason, seem to require that the owner or agent, sought to be charged, should be given that notice which would put them on their guard and give rise to the duty to detain the seaman at their peril. To adopt any other view means the amendment of the statute to the point where notice to any one of the parties named therein is notice to all. Such a proposition is obviously absurd and the absurdity of it is made plain by the ruling of the same court which decided these cases, in the case of *United States* v. *J. H. Winchester & Co. Inc.*, cited *supra* (p. 13), and from which ruling the pertinent portion is there quoted.

F. The petition for writs of certiorari should be granted.

Respectfully submitted,

ROGER O'DONNELL,
Counsel for Petitioner.

WILLIAM J. PETERS,
LAMBERT O'DONNELL,
Of Counsel.

March 12, 1935.

APPENDIX.

Immigration Act of 1924, 8 U. S. C., Sec. 167.

Sec. 20. (a) The owner, charterer, agent, consignee, or master of any vessel arriving in the United States from any place outside thereof who fails to detain on board any alien seaman employed on such vessel until the immigration officer in charge at the port of arrival has inspected such seamen (which inspection in all cases shall include a personal physical examination by the medical examiners), or who fails to detain such seaman on board after such inspection or to deport such seaman if required by such immigration officer or the Secretary of Labor to do so, shall pay to the collector of customs of the customs district in which the port of arrival is located the sum of $1,000 for each alien seaman in respect of whom such failure occurs. No vessel shall be granted clearance pending the determination of the liability to the payment of such fine, or while the fine remains unpaid, except that clearance may be granted prior to the determination of such question upon the deposit of a sum sufficient to cover such fine, or of a bond with sufficient surety to secure the payment thereof, approved by the collector of customs.